United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
DAVID W. McCARTHY, ESQ.
(20 minutes)

75-2019 B PLS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES ex rel. THOMAS MUNGO,

Petitioner,

v.

J. EDWIN LAVALLEE, Superintendent of
Clinton Correctional Facility.

Respondent.

- -X

BRIEF FOR PETITIONER THOMAS MUNGO

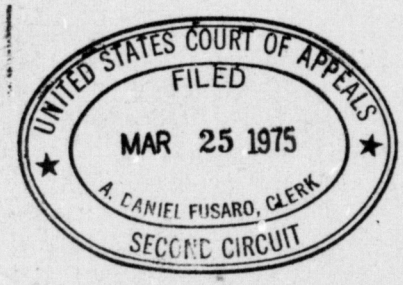

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TABLE OF CONTENTS

CASES PRESENTED

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PRELIMINARY STATEMENT

The petitioner was charged in two separate indictments in Kings County, New York. Indictment number 1095-67 alleged illegal possession of two weapons, a revolver and a pistol. The second indictment, 1096-67 alleged the petitioner, acting in concert with his co-defendant, Robert D'Ambra committed Robbery in the First Degree, Grand Larceny in the First Degree, and Assault in the Second Degree. After separate jury trials the petitioner was convicted of all crimes in each of the indictments.

On February 28, 1968, petitioner was sentenced under indictment 1096-67 to 15 to 20 years on the larceny count and

and two and one-half to 10 years on the assault count. The sentences were to be served concurrently. (Starkey, J.). On March 5, 1968, Mr. Justice Damiari sentenced petitioner to a term of 3 to 14 years under indictment 1095-67, said sentence to be concurrent with that previously pronounced by Mr. Justice Starkey. Upon information and belief petitioner is presently incarcerated.

The judgment of conviction under indictment 1095-67 was affirmed by the Appellate Division, Second Department, 34 AD 2d 616 (without opinion) and by the New York Court of Appeals, 28 N.Y. 2d 540 (without opinion). The judgment of conviction under indictment 1096-67 was affirmed by the Appellate Division Second Department, 34 AD 2d 736 (without opinion). Leave to appeal to the New York Court of Appeals was denied on July 1, 1970.

On March 16, 1973, petitioner, pro se, submitted a petition for writ of habeas corpus in the Eastern District of New York.. District Court Judge Mark Costantino was assigned the case and he subsequently appointed counsel pursuant to the Criminal Justice Act to represent petitioner. Petitioner was also granted leave to proceed in forma pauperis.

The relevant issues raised in the petition were submitted upon memoranda. No hearing was requested by either petitioner or respondent. On March 20, 1974, Judge Costantino,

in an opinion denied the petition. 372 F. Supp. 742 (see appendix).

Notice of appeal was duly filed and on July 16, 1974, application was made to this Court for a certificate of probable cause. Said application was denied on August 16 (Oakes, J. Frankel U.S.D.J., Kellerher, J.)

On August 30, 1974, counsel moved to reconsider and vacate the order denying the certificate of probable cause. On February 4, 1975, said motion and a certificate of probable cause were granted and counsel was assigned to prosecute the appeal.

SUMMARY OF ARGUMENT

a. On January 3, 1967, Mr. Leonard Monteleone, a coin collector was robbed by two men, a black and a caucasian.

On January 14, 1967, certain police radio communications identified the occupants of a blue car with a specific license plate number as persons who had stolen a ups truck. Petitioner, who is black, and two other men, both white, were observed in a car with a license plate number that substantially corresponded to that broadcast. The petitioner and the two passengers were ordered from the car by Patrolman Edward Obarowski who placed them under arrest and subsequently searched the automobile. He found and seized a revolver and a pistol.

These weapons were introduced into evidence at the trial upon indictment 1095/67 (the weapons charge) and served as the basis for the conviction thereunder.

The two hats seized by Officer Obarowski were admitted at the robbery trial of petitioner and D'Ambra and the black hat was relevant as corroborative of Mr. Monteleone's identification of petitioner.

The petitioner contends firstly that the failure of the prosecution to identify the ultimate source of the

police alarms, and the consequent failure to demonstrate the reliability of that source conclusively establishes that the arrest was without probable cause. The weapons and hats seized thereafter must be suppressed as the product of an illegal search and seizure. Whiteley v. Warden, 401 U.S. 560 (1971).

b. Later on, January 14, the petitioner was confronted by Mr. Monteleone at a stationhouse lineup. Present with the petitioner in the lineup were two white men, D'Ambra and Walter Johnson. Johnson was totally dissimilar to either of the two persons who had robbed Mr. Monteleone. His presence was pointless.

After observing the three men for thirty seconds, Mr. Monteleone was unable to identify either D'Ambra or petitioner as his robbers. Detective Guiney then ordered that the two hats seized upon their arrest be placed on the heads of D'Ambra and petitioner. Eyeglasses were placed on D'Ambra. The witness then identified petitioner and D'Ambra.

At trial however, the witness stated he was not certain that these two men were his assailants. He was then asked whether he had identified them at the stationhouse and at a preliminary hearing. To this he replied affirmatively.

Firstly, petitioner contends that the identification was the "fruit of the poisonous tree". The petitioner's

presence in the lineup and use of the seized hat were clear exploitations of the original illegality, requiring suppression of the identification as a violation of the Fourth Amendment.

Secondly, petitioner contends that he was denied due process of law by this identification testimony. The stationhouse confrontation was clearly suggestive, because petitioner was the only black in the lineup. It was certainly unnecessary as the complainant was not injured, leaving the jurisdiction or otherwise unable to respond to a properly conducted lineup.

Furthermore, the identification was unreliable. The description given of the black perpetrator did not correspond to petitioner and one significant facial characteristic, a moustache which another witness said the black perpetrator wore, was never mentioned by Mr. Monteleone.

STATEMENT OF FACTS

The Pre-Trial Motion to Suppress Tangible Evidence.

On January 14, 1967, at approximately 9:30 A.M., Patrolman Edward Obarowski was on duty in a Radio Motor Patrol car. (H 4)* He received messages on the police radio that a United Parcel Service Truck had been stolen in the 66th Precinct, that it had been left in the 64th Precinct and that perpetrators had been observed leaving "the scene" in a blue sedan with license plate number 62 7514 (H. 5-6)**

At 10:30, he observed three persons in a blue automobile with the license plate number 6Z 7154. (H 20) The officer, who had been travelling in the opposite direction with respect to the blue vehicle, made a U-turn, followed the car to a red light at Avenue U and West 8th Street, where it

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*The number in parenthesis preceded by "H" refer to the minutes of the pre-trial hearing of October 18, 1967, conducted before Mr. Justice Julius Helfand.

**On cross-examination the witness admitted that he never learned who the ultimate source of these messages was and that he referred to the source as "an unknown person" (H 21)

halted. Officer Obarowski ordered petitioner, who was the driver, to leave the auto. The Petitioner complied (H 15) and all three men were placed under arrest (H 8).

After frisking the three men, the officer searched the car. (H 9) He found a .22 caliber revolver, under the driver's seat, and a black metal .32 caliber automatic under the passenger's seat. (H 18) Also found behind the rear seat were three hats, two of which were subsequently offered at a robbery trial. At the precinct the three occupants of the car were charged with criminally receiving stolen property, possession of weapons, and possession of burglar's tools. (H 29) A complaint was never drawn accusing them of larceny of a truck or hijacking. (H 18)

Patrolman John D. Sullivan testified that he was assigned to the Communications Unit of the Police Department and that among other duties, he kept and filed records. (H 31) He had in his possession CRDs - forms used to facilitate the receipt and transmissions of information. (H 32)

The radio messages broadcast on this matter were as follows:

> "9:38 a.m. January 14, 1967. From the 66th Precinct, Sergeant Caruso. Received by Patrolman Reilly. 68th Street and Fort Hamilton Parkway. See complainant re: possible larceny of truck. Sergeant Caruso requested car 66 G, which is unavailable and call was given 66D.

* *

On the rear of the same slip, time stamped 9:56 a.m., January 14, 1967, 7416 United Parcel truck taken in front of 825 - 71st Street. Received from car 64G, designation 2053, at 10:34.

* *

Time stamp 10:08 a.m., January 14, '67. From 66th Precinct, Sergeant Caruso. United Parcel truck, dark brown 1939 rocket, New York 145749 commercial. On the side truck number 7146, stolen from 68th Street and Fort Hamilton Parkway. Direction unknown. Transmitted by radio by operator number 37, Patrolman James McGovern.

* *

10:10 a.m., January 14, '67. R.N.P. 64G. Recovered at 825 - 71st Street unoccupied.

* *

10:13 a.m., January 14, 1967, from car 64A. Perpetrators escaped in 6 Z 7154 New York, blue, four door vehicle, '66 Plymouth. Received by Patrolman James McGovern, assigned to radio.

* *

10:21 a.m., January 14, '67. Indication '66 Plymouth by operator number 27, Frank Mollo.

* *

10:35 a.m., January 14, 1967. From R.M.P. 62, Sergeant number 2. Indicates 62B is also on scene. West 8th Street and Avenue U holding occupants of 6 Z 7154. Received by operator number 37, Patrolman James McGovern.

* *

At 10:35 a.m., January 14, '67; 66 detectives, 64 detectives notified. 10:53 a.m., January 14, 64, signal 10383. " [H 33-36]

Significantly, the source of the information was unknown. (H 21) While the officers who received the transmission and made the notations were employed by the Police Department at the time of the hearing, they were never called to testify. (H 39) There is absolutely no evidence as to where the information regarding the alleged perpetrators was obtained except that the forms stated the transmission was received from certain numbered radio motor patrol cars. (H 35)

The motion to suppress was denied. The judge found probable cause to believe a felony had been committed and that the defendants had committed it. His decision was

> based on the information he had, that is, the description of the car, the number of its occupants and the other related matters pertaining to the crime under investigation...

He further found that the search of the auto both at the scene where the three men were apprehended and at the stationhouse was incident to a lawful arrest.

The Identification Hearing and Trial regarding the robbery.

For the purpose of brevity, the testimony of Mr. Leonard Monteleone at both the identification hearing which was held after the jury was selected, and his testimony at the trial itself, will be incorporated into one statement.

At approximately 2:30 p.m., on January 3, 1967, Mr. Monteleone, a coin collector for the New York Telephone Company, was leaving a factory at 1301 Gravesend Neck Road, Brooklyn.

As he opened the door to leave, he inadvertently struck a black man with the door. He looked at the man full-faced, said "Excuse me" and continued to the New York Telephone truck in which cannisters containing coins were located. (15, 16) The man he had just struck approached Mr. Monteleone from the side. The witness looked momentarily at the man but looked straight ahead as he was ordered into the trucks. (7, 8, 16, 18) His entire observation of the face of the black robber was about five seconds. (16, 126)

Inside the truck, Mr. Monteleone followed instructions to lie down in the back of the truck with his face on the floor. (8, 24) A second man, Caucasian, who he subsequently identified as Robert D'Ambra entered the truck and was given the ignition keys. (8, 93, 118) The truck was driven for four or five minutes, stopped and some of the coin cannisters were removed. (8) The robbers then left, and Mr. Monteleone called the police (8).

Later on January 3, the witness gave a description of the robbers to the police, more specifically Detective

Guiney. (11, 12) He testified the description he gave was:

> One male Negro, tan coat; about six feet; 180 pounds; a black state trooper hat, with fur on it (12)

Significantly, Detective Guiney testified that the UF 61, the police report prepared upon the information given by Mr. Monteleone, reflected the description as follows:

> One male Negro, thirty-five to forty, six feet two inches, two hundred pounds, wearing a tan jacket and light brown hunting cap. (272, 276)

In neither description did complainant mention a moustache on the robber.

On January 4, 1967, Mr. Monteleone provided a police artist with a description of the white robber and assisted him in preparing a sketch (9, 13, 31, 32). The sketch was admitted at trial as fairly and accurately reflecting the Caucasian robber. (158, 360) However, he was unable to describe any facial characteristics of the black assailant-only that he was dark.* (42) No sketch of the black robber was rendered. (13, 14)

On January 14, 1967, Detective Guiney called Mr. Monteleone and said: "I want you to come down and identify - see if you can identify two people for me." (18) Detective

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*When he went to the artist he was unable to describe his size, chin, forehead, ears, the existence or non-existence of a moustache or any other facial hair. (158, 159, 170) He testified at trial that there was a little fuzz on the black's chin. (131)

Guiney stated that he informed Mr. Monteleone that he had suspects in custody. (262) The only negro present, the petitioner, was thirty years old, six feet tall, one hundred eighty pounds, in a tan overcoat and wearing a full moustache. (251) D'Ambra was between twenty-five and thirty, with black hair. Walter Johnson was between forty and forty-five with grey hair. (26, 27, 111)

The complainant viewed the three men through a two way mirror. They were in a cage. (134, 157) *

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*Detective Guiney in confusing testimony stated that when viewed by Mr. Monteleone the three suspects were not in a cage. However, apparently before this "formal" view, Monteleone had observed them in a cage.

Q. Where were the defendants when Monteleone viewed them?
A. They were in the squad officer.
Q. Were they in the cage?
A. At the time of the viewing?
Q. Yes.
A. No, sir.
THE COURT: Had they been in the cage at all at any time?
THE WITNESS: Yes, sir.
Q. Now, at any time did Mr. Monteleone see the defendants in the cage?
A. Yes.
Q. Okay, But Mr. Monteleone was permitted to see the defendants in the cage; isn't that right?
A. This was not a lineup.
Q. It wasn't a lineup, was it, officer?
A. No. I didn't consider it a lineup at all, sir."
(250, 260, 261)

He observed the person for 30 seconds (20, 21). (He also testified he looked at them for two minutes. [21]) None wore hats. He was then unable to identify them. (135, 165) Detective Guiney said, "Let's try hats on them," and a gray fedora (People's exhibit 3) and the black hat (People's exhibit 4) were placed on D'Ambra and Mungo, respectively.* Eyeglasses were placed on D'Ambra. Monteleone then identified D'Ambra and petitioner as his assailants. (10, 23, 43) His identification, while positive, was partially due to the hats. However, the hats did not assist in perceiving facial characteristics. (109, 147)

At both the pre-trial hearing, hearing, and trial the witness was unable to identify petitioner. He was doubtful about his identification. (9, 10, 24, 30, 89, 90, 128) However, he acknowledged his prior identification in the stationhouse and at the preliminary hearing. (11)

Patrolman Edward Oborawski testified that he had seized the hats (People's exhibits 3 and 4) after arresting the defendants (230, 233). He further stated when arrested the petitioner had a full moustache. (244, 257).

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*When shown the gray fedora, the witness had stated it was similar to the hat the white robber had been wearing. (99) The black hat was similar to the one worn by the black perpetrator. (100, 131) However, when confronted with a police report (UF 61) that reflected his original description, he said it was "a light brown state trooper type hat." (131)

Mrs. Vinzenza Rothenberg testified that she saw a black man with a moustache wearing a fur trimmed black hat place a gun to Mr. Monteleone's side. (278) As she was concerned for the safety of the child she was walking with, she immediately turned around and returned to a laundromat. (279) She could not identify anyone as the perpetrator. (281)

D'Ambra testified in his own behalf.

The defense rested and after deliberating, the jury found both defendants guilty on all counts.

POINT I

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE PEOPLE FAILED TO SUPPORT THEIR BURDEN OF ESTABLISHING AT THE SUPPRESSION HEARING THAT PROBABLE CAUSE EXISTED FOR PETITIONER'S ARREST.

Patrolman Obarowski stated that he made the initial stop and arrest of the petitioner and co-defendants as the result of the information he received from a radio run on the police radio.* It is clear that no activity of the three apprehended suspects, while observed by the patrolman, contributed to their arrest. They committed no observable illegal acts as the patrolman had them under surveillance. They were not speeding and did not violate any traffic regulations. In fact, they followed to the letter all the officer's directives, including leaving the automobile when so ordered. Their conduct could not be considered suspicious. Also, there was no contention by the State that the police officer possessed any information other than that contained in the radio run.

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*The only communication that specified the alleged perpetrators apparently reflected the following: "10:30 a.m. January 14, 1967, from car 64 A. Perpetrators escaped in 6 Z 7154 New York, blue, four door, vehicle, '66 Plymouth. Received by Patrolman James McGovern, assigned to radio." (pre-trial hearing p. 35)

Under New York State law, the People have the initial burden, at a hearing on a motion to suppress, of setting forth sufficient facts which, if believed, would constitute a prima facie showing of probable cause. See, e.g., People v. BALDWIN, 25 N.Y. 2d 66, 70 (1969). The People failed to sustain this burden and, accordingly this court should reverse the lower court's denial of the petition for a writ of habeas corpus.

Preliminarily, it must be noted that the lower court appears to have misconstrued the thrust of petitioner's argument.

The lower court upheld the denial of the motion suppress on the ground that at the time of the arrest and search the police believed they had probable cause (Opin. at 8). The issue is not, however, whether the radio runs contained information from which the police could reasonably believe probable cause existed; the issue is whether the State established the actual existence of probable cause at the hearing. This is the meaning of the following statement of the United States Supreme Court in WHITELEY v. WARDEN, 401 U.S. 560, 568 (1971):

> "We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers

requesting aid offered the magistrate the information to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."*

Turning, then, to the evidence set forth at the suppression hearing, it is clear that it was inadequate to establish probable cause.

Perhaps the key failure of the State was the fact that it never set forth the ultimate source of the radio runs. Upon cross-examination Patrolman Obarowski candidly conceded that the source of the radio run giving the license plate number of the suspect car was "an unknown person" whose identity he never learned (pre-trial hearing at 21).**

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*See, also MAYER v. MOEYKINS, 494 F 2d 855, 858 (2d Cir. 1974).

**It must be noted that the message containing the license number was the fifth message concerning this matter and was the only one where the source, albeit "unknown", was ever referred to. The first and third runs apparently originated at the scene of the larceny at 68th Street and Fort Hamilton Parkway in the 66th Precinct where the complainant was located. The second and fourth calls apparently emanated from 825 71st Street in the 64th Precinct where the truck was abandoned. The fifth call was received from a 64th Precinct car at an unidentified location and from an unknown source (pre-trial hearing at 33-35). The arrest itself was made in the 62nd Precinct and detectives in both the 64th and 66th Precincts were advised (Id at 36).

In Whiteley v. Warden, supra, the Supreme Court found probable cause lacking in a case that recommended itself more to a contrary finding than do the facts here. In that case, a complaint had been signed by a sheriff charging the defendant with breaking and entry and a warrant had been issued by a justice of the peace.

The information in the complaint was based upon a tip communicated to the sheriff. It was extremely specific in that the complaint named as accomplice one Jack Daley. Descriptions of Daley and defendant were given, including the location and description of tattoes, and some of the fruits of the burglary were enumerated. The information contained in the complaint was broadcast over the state-wide police network (apparently as state bulletin 881). Not only was a detailed description of the suspects given on the broadcast, but also of the car, and that a warrant was being issued. The Court summarized the information available to the arresting officer as follows:

> (1) the data contained in state bulletin 881, reproduced above; (2) the knowledge, obtained by personal observation, that two men were driving a car matching the car described in the radio bulletin; (3) the knowledge, possessed by one of the arresting officers, that one of the people in the car was Jack Daley...; (4) the knowledge, acquired by personal knowledge, that the other individual in the car fitted the description of Whiteley, contained in state bulletin 881; and

(5) the knowledge, acquired by the officer after stopping Whiteley, that he had given a false name. (401 U.S. at p. 566; 28 L.Ed. 2d at p. 312)

The Court stated that the complaint upon which the arrest warrant was based was insufficient in that it merely stated conclusions of the sheriff. Here, not only was there no complaint or warrant,* but the information was just as conclusory. Indeed, as testified, the source of the information was unknown.

Where, as here, information comes from a non-official source, it must satisfy a two-pronged test before it can contribute to probable cause; facts must be set forth from which it may be concluded firstly, that the information is accurate and, secondly, that the informant was reliable. Spinelli v. United States, 393 U.S. 410, 413 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964). Because no one knows either the

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* The amount of information that will constitute probable cause in a non-warrant situation is at least as much as that needed where a warrant exists, Whiteley, supra, 401 U.S. at 566, and at least one court has suggested that more is needed in the non-warrant situation. United States v. ANDERSON, 500 F 2d 1311, 1315 n. 8 (5th Cir. 1974).

human source of the information or the basis of that source's information neither of these tests can be met.* To paraphrase Aguilar:

> "For all that appears, the source here merely suspected, believed or concluded that the car whose license number was given contained the perpetrators of the larceny of the truck."**

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*While the usual way of establishing the reliability of the informant is to show that he was reliable on the past, reliability may also be established by independent corroboration of the informant's information and independent likelihood, apart from this information, that the suspect was committing a crime. Spinelli, supra, 393 U.S. at 417. Here, however, as noted, the actions of the occupants of the vehicle were completely devoid of suspicion (compare Whiteley, supra, where even the giving of a false name did not aid in establishing reliability) and the reports were so lacking in detail that their verification added nothing (compare, e.g., United States v. Smith, 503 F 2d 1037, 1039 (9th Cir. 1974).

**The chronology and geographic origin of the various radio runs indicates that the person who gave the license numbers was not the complainant referred to in the first run. Since the truck was abandoned at a point some distance from the theft (in another precinct) and since it was from the latter location that the thieves fled in the vehicle described, it was undoubtedly someone else who gave the police this information. (This demonstrates the error in the lower court's statement that this report "was evidently made by a witness at the scene of the crime". Opin. at 8) Since the State has the burden of demonstrating the informant's reliability, the absence of express indications of non-reliability does not help support this burden; it should be noted, however, that at least one implied indication of non-reliability is present, and that is the fact that neither petitioner nor his companions was ever charged with or prosecuted for the larceny of the truck (pre-trial hearing at 17-18).

Several cases decided since Whiteleysupport the conclusion that probable cause was not established here.* In MAYER v. MOEYKINS, 494 F 2d 855 (2d Cir. 1974) this court held that there was probable cause where (a) the victim had given the police a description and had made photographic identifications of defendant (b) the defendant was registered in a nearby motel and (c) the police were informed by the motel manager that she had found a holster in his room. In United States v. HAMILTON, 490 F 2d 598 (9th Cir. 1974) probable cause was held lacking where a reliable informant told an FBI agent that a truck had marijuana concealed in a false compartment and the FBI agent telephoned this information to a Customs agent; since there was no testimony by either agent as to how the informant had come by his information the denial of a motion to suppress was reversed, citing, inter alia, Whiteley. In United States v. HERNANDEZ, 486 F 2d 614 (7th Cir. 1973) it was held that the following radio run

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* The cases cited by respondent in his Memorandum of Law below (United States ex rel. Williams v. La Vallee, 415 F 2d 643 (2d Cir. 1969) and United States ex rel. Wilson v. La Vallee, 367 F 2d 351 [2d Cir. 1966]) are not authority for a contrary conclusion because they were decided before Whiteley and contain no discussion of the need to establish the reliability and accuracy of the ultimate source of information. This circuit has afforded Whitely full retroactivety. MAYER v. MOEYKINS, 494 F 2d 855, 857 (2d Cir. 1974).

established reasonable suspicion but not probable cause:

> "REPORT CAR AT LINCOLN ILLEGAL ENTRIES ALIENS WHITE FORD SPORTVAN BDL 70 MODEL SEVERAL MEX. SUBJECT IN IT COVERED UP BY BLANKET 71 ILPF 8083 LEFT LINCOLN 10 10P DRIVER ASK DISTANCE JOLET";

since the officers who received this run merely stopped the van for investigation and did not make an arrest until they observed the aliens moving about under blankets, the convictions were affirmed-"Although the radio bulletin was not sufficient to support an arrest, it was sufficient to support an investigatory stop "Id at 617. (See also United States v. CAGE, 494 F 2d 740 (10th Cir. 1974) where the information in a radio run was held sufficient to justify a stop, and probable cause was established because additional evidence was in plain view)* See also United States v. BEASLEY, 485 F 2d 60 (10th Cir. 1973); United States v. IMPSON, 482 F 2d 197 (5th Cir. 1973); United States v. COX,475 F 2d 837 (9th Cir. 1973); United States v. POND, 382 F. Supp. 556 (S.D.N.Y. 1974); People v. LYPKA, _____N.Y. 2d _____(1975).

*Here, by adverse comparison, the arrest was made as soon as the car was stopped (H. 8) and nothing incriminating was in open view.

POINT II

TESTIMONY OF THE STATIONHOUSE IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED AS "FRUIT OF THE POISONOUS TREE".

After the illegal arrest of petitioner, both he and D'Ambra were exhibited to a Mr. Monteleone. This exhibition, and subsequent testimony of the witness regarding this precinct-house identification of petitioner, were the fruits of the illegal arrest and detention and, consequently, should be suppressed.

The law is settled that the exclusionary rule regarding violations of the Fourth Amendment is not restricted in its application to those tangible objects or intangibles such as confessions gleaned as the direct result of the prohibited governmental activity. In Silverthorne v. United States, 251 U.S. 385, the Government intended to make use of copies governmental agents had made of illegally obtained books and records, notwithstanding the Court-ordered return of the originals as illegally seized. The Government wanted to use the copies in its investigations and prosecution of the defendant. In rejecting the Government's argument that the Fourth Amendment applied only to the originals, the direct result of the search, the Supreme Court said:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

See also Nardone v. U.S., 308 U.S. 343, (1939); Wong Sun v. U.S., 371 U.S. 471, 484 9 L.Ed. 2d 441, 453, 83 S. Ct. 407.

While evidence ultimately found as the result of an illegal search is not, by that fact alone, suppressible, the test as stated by the Supreme Court in Wong Sun, supra, 371 U.S. at 488, 9 L. Ed. 2d at 455, is:

> "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Essentially, therefore, as stated in Wong Sun, if the evidence is obtained from an "independent source" Silverthorne Lumber Co. v. U.S., supra, or the relationship between the original illegal activity and the eventual "fruit" of that proscribed conduct has "become so attenuated as to dissipate the taint," Nardone v. U.S., 308 U.S. 338, 341, 84 L.Ed. 307, 312, 610 S. Ct. 266., it is not suppressible.

At the time of the petitioner's arrest, there was absolutely no evidence whatsoever linking him to the robbery of Mr. Monteleone. His arrest was predicated solely upon the police radio bulletin. The record reveals that the only evidence which could conceivably connect anyone with the New York Telephone robbery was seized from D'Ambra. The discovery of the keys obviously led the police to contact Mr. Monteleone. Significantly, although originally arrested for the "hijacking" of the United Parcel truck, no charge was ever formally lodged against petitioner. This failure to charge petitioner, and the chronology of the events on the day of his arrest, leads to the conclusion that, at some point, the nonexistence of evidence connecting petitioner to the United Parcel incident became clear. Consequently, the police made use of the petitioner's presence at the precinct house to pursue their investigation of the New York Telephone robbery. They clearly exploited the original constitutionally impermissible arrest, firstly, by retaining custody of the petitioner under the pretense of an arrest for the alleged UPS incident and, secondly, by using his apprehension as the occasion to place him in the "showup", the makeup of which leads to the conclusion that the police wanted him identified and which resulted in Mr. Monteleone's testimony.

In U.S. v. Edmons, 432 F. 2d 577 (2d Cir., 1970), this court reversed a conviction of an alleged assailant of Federal officers. After apprehending one Reggi Oliver wanted for violation of the Selective Service Act, agents of the FBI were assaulted by a crowd with the intent to, and effect of, freeing Oliver. Those involved in the assault were not apprehended at the scene on the night of the assault. The next day agents other than those assaulted, were sent back to the scene where they arrested five individuals purportedly for failure to carry their Selective Service cards, a violation of the Selective Service Act. Although there had been a technical violation of the law - all five did not have their cards - this Court noted that no case had been found in which someone had been prosecuted for this offense. It was concluded, citing other reasons as well, that the arrest was illegal - in effect, a sham. Consequently, the subsequent testimony of the identifying witnesses (agents) who had viewed the five after the counterfeit arrest was suppressed.

The Court said,

> "When the police, not knowing the perpetrator's identity, make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial, the fulfillment of this objective is as much as exploitation of the

> primary illegality as when a defendant is arrested without probable cause in the expectation that a search or the taking of fingerprints, see Davis v. Mississippi, (cite omitted) will yield evidence that will convict him of a crime and the illegally seized objects or fingerprints are introduced at trial." Id at 584.

Although the original arrest here may have arguably been made in good faith,* the continued custody of petitioner and the use of the custody as an opportunity to exhibit petitioner in the questionable showup is clearly proscribed. Had Patrolman Obarowski not made the illegal arrest and search and the police not held petitioner when they knew that their original arrest was baseless, the witness would not have had occasion to view petitioner. Therefore, the resultant testimony is an exploitation of the prohibited arrest and custody of petitioner. Again in Edmons, this Court noted

> The Government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act.

In U.S. v. Tane, 329 F. 2d 848 (2d Cir. 1964), the Court affirmed the District Court's dismissal of the

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*"We are not obliged to rule that when an arrest made in good faith turns out to have been illegal because of lack of probable cause, an identification resulting from the consequent custody must inevitably be excluded." U.S. v. Edmons, at p. 484.

defendant's indictment as the product of an illegal wiretap. The identity of the main witness against Tane was gleaned from illegal wiretap. Although the Government argued that the witness' testimony was an "intervening voluntary act," in effect, cleansing the taint, the Court noted that the first evidence of wrongdoing had been obtained from the wiretap and the knowledge of the wiretap had been used to impel the witness to testify.

Similarly here, the illegal arrest was the source of the petitioner's exhibition to Mr. Monteleone. Also the show-up itself was the only basis fro Mr. Monteleone's trial testimony-there was, as well be noted in Point III, not in-court identification. Consequently, it cannot be argued that the witness's testimony was obtained from an independent source, but more aptly, as this court said in Tane.

> [T]he road from the [tap] to the testimony may be long, but it is straight. Id at 853.

In any event, the State patently failed to sustain its burden of showing that the primary illegality "did not lead, directly or indirectly," to the trial testimony.

Therefore, it is respectfully submitted that the testimony of Mr. Monteleone, at trial, that he had identified petitioner at the precinct house, preliminary hearing and Grand Jury is the "fruit" of the initial illegal arrest and

custody of petitioner and therefcre the testimony should be suppressed.

POINT III

THE TESTIMONY OF THE PRE-TRIAL IDENTIFICATIONS DENIED PETITIONER DUE PROCESS

The pre-trial confrontation between Mr. Monteleone and petitioner was so unnecessarily suggestive that it gave rise to a substantial likelihood of irreparable misidentification U.S. ex rel. Phipps v. Follette, 428 F 2d 912 (2d Cir. 1970). Furthermore the totality of the circumstances clearly establish that the pre-trial identifications recited at the trial were unreliable. Neil v. Biggers, 409 U.S. 188 (1972).

Mungo was the only black exhibited. More importantly, he was shown with D'Ambra. These circumstances placed this procedure in a category far more prejudicial than the oft-criticized general "showup". Stovall v. Denno, 388 U.S. 293, 302, (1967). When the hat and eyeglasses were placed on D'Ambra his facial features most obviously were made to conform closely to Monteleone's mental picture of the Caucasian perpetrator as reflected in the artist's sketch. His manipulated conclusion that D'Ambra was one of the robbers was then clearly transferred to petitioner as the other. Having been made certain that the white robber was D'Ambra the clear implication was that the only Black contemporaneously exhibited to the witness was the second robber. U.S. ex rel. Phipps v.

v. Follette, 428 F 2d 912, 913 (2d Cir. 1970). This connection was established by Monteleone himself. The only charge in circumstance from the initial inability to identify petitioner to the subsequent purported recognition was that the hat was placed on his head.* However, Monteleone himself testified that the hat did not aid in perceiving facial characteristics.

The confrontation, furthermore, was unnecessary. In Stovall v. Denno, supra, the Supreme Court justified a "showup" of one person, Stovall, to the victim because her condition was "guarded". She was in the hospital and either a showup had to be conducted or, very likely, there would be no accusation of the petitioner. Mr. Monteleone was not injured, prospectively unavailable or indisposed.

The arrest occurred twelve days after the robbery. This lengthy hiatus is not the kind of quick, on the scene showups approved in United States ex rel. Anderson v. Mancusi, 413 F 2d 1012 (2d Cir. 1969). [one hour between theft and

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*The total dissimilarity between the hat described initially by Monteleone and that placed on petitioner's head make the identification ever more untrustworthy.

showup], see also United States ex rel. Rivera v. McKendrick, 448 F 2d 30, 34 (2d Cir. 1971). Furthermore, the petitioner's presence under these circumstances, with the apparently accurately identified D'Ambra, conveyed the police belief that they were the suspected robbery team. See, dissenting opinion, cf Mr. Justice Douglas in Biggers v. Tennessee, 390 U.S. 404, 407 (1968). Foster v. California 394 U.S. 440, (1969).

In any event, the confrontation had an irreparable potential for misidentification. Clearly Detective Guiney had announced he had suspects to identify and petitioner was the only black in the showup. In United States ex rel. Rivera v. McKendrick, 448 F 2d 30 (2d Cir. 1970) this Court ruled that a hospital showup between Rivera and the victim was impermissibly suggestive and conducive to mistaken identification where the Detective announced he would have someone for the witness to identify. 448 F 2d at p. 32. As here, there were no exigent or compelling reasons for the showups, and the witness therein could have been taken to the stationhouse for a proper lineup.

More importantly, the identifications were highly unreliable. Significantly, Mr. Monteleone did not identify petitioner at the pre-trial hearing or trial rather, he

testified that he was doubtful of his identification. The application of the evidence to guidelines set forth in Neil v. Bigges, 409 U.S. 188 (1972) conclusively demonstrates unreliability. In Neil v. Biggers, supra, at p. 409 the Court stated:

> The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness degree of attention, the accuracy of the witness prior description of the criminal, the level of certainly demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation.

See also, United States ex rel. Bisordi v. La Vallee, 461 F 2d 1020 (2d Cir. 1972).

Mr. Monteleone testified that he only observed the black robber for about five seconds - a fleeting observation at best. This is not the type of observation which would indelibly mark the robber's image in Mr. Monteleone's mind. He did not know that a robbery was afoot. cf United States ex rel. Phipps v. Follette, 428 F 2d 912, 915 (2d Cir. 1970). There was no verbal exchange, U.S. ex rel. Bisordi v. LaFollette, supra, only a fleeting glance. After saying "excuse me", Monteleone continued walking to the truck. This was merely only of the many uneventful, momentary encounters which daily occur in our urban society.

As Monteleone approached the truck, he was told to enter it. He glanced quickly at the black man who was giving directives. However, he immediately looked straight ahead again and entered the cab. This observation was not full-faced, and was too brief to implant a lasting image. In fact, Mr. Monteleone stated his total observation of the black robber's face to have been about five seconds. This is simply too brief to have established an initial reliable observation. cf United States ex rel. Robinson v. Zelker, 468 F 2d 159 (2d Cir. 1972) [10-15 seconds], U.S. ex rel Bisordi v. LaValle, supra, [3 minutes], U.S. ex rel. Phipps v. Follette [30 seconds]; U.S. ex rel. Anderson v. Mancusi, supra, [30 seconds] U.S. v. Mims, 481 F 2d 636 (2d Circ. 1973) [one minute]. U.S. ex rel. Riviera v. McKendrick, supra, [less than 3 minutes].

The description given demonstrates that his observations were not accurate. He described the person as being 35-40 years old. Petitioner, Detective Guiney testified, appeared to be thirty. Petitioner was two inches shorter the culprit described.* His weight was also at least twenty

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*Although two inches may seem an insignificant discrepancy, the height evaluation was not a mere judgment from afar. Monteleone, if he, indeed, had sufficient time to properly determine height, could compare his own established height to the person apparently standing right next to him.

pounds less than the perpetrator described.

Of equal importance, the clothing and hat petitioner wore in the lineup did not comport with the Monteleone description. Petitioner was wearing a tan overcoat, the description referred to a brown jacket. The "black state trooper's" hat which petitioner wore and which Mr. Monteleone had said assisted him in making the identification was not the light brown hunting cap described to the police.

Conclusively establishing the unreliability of the subsequent identification was the failure to note the full moustache. Monteleone testified he did not remember one, just a "little fuzz" on the chin. This omission established the witness had a poor and unretentive image of the perpetrator, as soon as one half hour after the robbery when a description was given to the responding officers.*

The non-existence of a specific facial image is clear. One day after the robbery, Mr. Monteleone assisted in

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* In Neil v. Biggers, supra, 409 U.S. at 200, the Court noted the description included skin texture. Such specificity would justify a conclusion that the witness obtained a close look of the perpetrator and retained a substantial image. However, such an obvious facial accouterment as a prominent moustache could not be missed

preparing a sketch of the robbers. His sketch of D'Ambra was so accurate that it was offered at trial as corroborative evidence. On the other hand he could describe no feature of the black man except that he was "dark".*

The inability to aid in the preparation of a sketch of the black robber reflects the absence of a mental image, not an inability to transpose a mental picture into a description.

Mr. Monteleone was clearly articulate enough to verbalize his image of D'Ambra.

At the stationhouse confrontation the witness' identification was simply manufactured. Initially, he was unable to identify petitioner but when a hat was placed upon petitioner's head he was "positive". However, it is clear that what occurred was a transfer of his accurate image of D'Ambra, who had a hat and eyeglasses placed on him, to petitioner. Monteleone testified the hat did not aid in perceiving facial characteristics, upon which he was unable to make identification.

Yet the hat upon which the identification was partially founded was clearly not the light tan hunting cap

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*This discrepancy between an accurate image of the Caucasian and none of the black is perhaps explainable as there was no testimony Mr. Monteleone worked with Blacks or associated with them. See U.S. ex rel. Rutherford v. Deegan, 406 F 2d 217, 220 (2d Cir. 1969).

originally described. The superimposition of petitioner's physical characteristics at the stationhouse confrontation upon the witness' mind is established by his own testimony. When asked to recite the description he initially gave to the police he erroneously gave a description of petitioner at the precinct; including reference to the black hat and tan overcoat, rather than the light tan hunting cap and brown jacket he had used in his original description.

Furthermore, the 11 days between the robbery and the confrontation was so lengthy that the weak, if existent, image most likely dissipated completely. Indeed the inability to give a description the day after the robbery substantiates this conclusion, particularly when combined with the inability to identify petitioner initially at the showup. In U.S. ex rel. Rivera v. McKendrick, supra, the twelve days between the offense and confrontation was cited as one of the bases upon which this Court concluded the showup was unnecessarily suggestive.

The record in the case irrefutably establishes that the only evidence implicating petitioner was the manufactured product of the impermissibly and unnecessarily suggestive stationhouse confrontation. If the recognition that identification is inherently unreliable is to be paid more than lip-service, the petition must be granted.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES ex rel. THOMAS MUNGO, :

Petitioner, : Proof of Service

v. : 75-2019

J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility. :

Respondent. :

- -X

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

CARMELA J. CARFORA, being duly swonr, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 4 Ruth Drive, Hicksville, New York.

That on the twenty-first day of March, 1975, deponent served a copy of the Brief and Appendix filed with the United States Court of Appeals for the Second Circuit upon:

Louis J. Lefkowitz, Attorney General of New York State, Two World Trade Center, New York, New York 10047, attorney for Respondnet.

By depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me,
this 21st day of March, 1975.

Martin S. Dorfman

MARTIN S. DORFMAN
Notary Public, State of New York
No. 41-6078830
Qualified in Queens County
Commission Expires March 30, 1976

Carmela J. Carfora
CARMELA J. CARFORA

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by .

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

McCARTHY & DORFMAN

Attorneys for

Office and Post Office Address

1527 Franklin Avenue

MINEOLA, N. Y. 11501

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

McCARTHY & DORFMAN

Attorneys for

Office and Post Office Address

1527 Franklin Avenue

MINEOLA, N. Y. 11501

To

Attorney(s) for

Index No. Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel.
THOMAS MUNGO,
Petitioner

v.

LaVALLEE,

Respondent

PROOF OF SERVICE

McCARTHY & DORFMAN and BRENNER

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MINEOLA, N. Y. 11501

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION SHOULD BE GRANTED AND A WRIT OF HABEAS CORPUS ISSUED.

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